UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

--x

LEROY JONES :

Plaintiff, :

- against - :

SOUTH NASSAU COMMUNITIES HOSPITAL :

Defendant. :

--x

Civil Action No. 17-CV-03369 (JFB)(GRB)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT PURSUANT TO RULE 12(B)(6)

PUTNEY, TWOMBLY, HALL & HIRSON LLP
Attorneys for South Nassau Communities Hospital
521 Fifth Avenue
New York, New York 10175
(212) 682-0020

Of Counsel:
Mary Ellen Donnelly
Steven J. Seidenfeld

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

RELEVANT FACTS 2

ARGUMENT 3

POINT I APPLICABLE PLEADING STANDARDS FOR A MOTION TO DISMISS 3

POINT II PLAINTIFF HAS FAILED TO SATISFY THE APPLICABLE PLEADING STANDARDS 4

A. *Twombly* and *Iqbal* Pleading Standards 5

POINT III PLAINTIFF CANNOT STATE A CLAIM FOR HOSTILE WORK ENVIRONMENT 6

POINT IV PLAINTIFF CANNOT STATE A CLAIM FOR RACE OR GENDER DISCRIMINATION 9

POINT V PLAINTIFF CANNOT STATE A CLAIM OF RETALIATION UNDER NYLL SECTION 741 11

POINT VI THE COURT SHOULD DECLINE TO EXERCISE SUPPLEMENTAL JURISDICTION OVER ANY REMAINING STATE LAW CLAIMS 14

CONCLUSION 15

TABLE OF AUTHORITIES

Federal Cases **Page(s)**

Ashcroft v. Iqbal,
129 S. Ct. 1937 (2009) 5

Batiste v. City Univ. of New York,
2017 WL 2912525 (S.D.N.Y. July 7, 2017) 10

Bell Atlantic Corp. v. Twombly,
550 U.S. 544 (2007) 4, 5

Betancourt v. City of New York HRA/DSS,
2007 WL 2948345 (S.D.N.Y. Oct. 9, 2007) 4

Boakye-Yiadom v. Laria,
2012 WL 5866186 (E.D.N.Y. Nov. 19, 2012) 7

Campbell v. Corr. Med. Care, Inc.,
2014 WL 2608334 (W.D.N.Y. June 11, 2014) 8

Cruz v. Coach Stores, Inc.,
202 F.3d 560 (2d Cir. 2000) 6

Daniel v. Long Island Hous. P'ship, Inc.,
2009 WL 702209 (E.D.N.Y. Mar. 13, 2009) 4

Davis v. Columbia Univ.,
2010 WL 2143665 (S.D.N.Y. May 26, 2010) 4

Davis v. Dep't of Veterans Affairs,
178 F. Appx 51 (2d Cir. 2006) 10

De Jesus v. Sears, Roebuck & Co., Inc.,
87 F.3d 65 (2d Cir. 1996) 4, 5

Deras v. Metro. Transp. Auth.,
2013 WL 1193000 (E.D.N.Y. Mar. 22, 2013) 7

Dougherty v. Meml. Sloan-Kettering Cancer Ctr.,
2002 WL 1610916 (S.D.N.Y. July 22, 2002) 11

Faragher v. City of Boca Raton,
524 U.S. 775 (1998) 7

Fox v. Nat'l R.R. Passenger Corp.,
2009 WL 425806 (N.D.N.Y. Feb. 19, 2009) 7

Gorzynski v. JetBlue Airways Corp.,
596 F.3d 93 (2d Cir. 2010) 11

Hanig v. Yorktown Cent. Sch. Dist.,
384 F. Supp. 2d 710 (S.D.N.Y. 2005) 4

Hanley v. Nassau Health Care Corp.,
2013 WL 3364375 (E.D.N.Y. July 3, 2013) 14

Hishon v. King & Spalding,
467 U.S. 69 (1984) 3

Holmes v. Astor Servs. for Children & Families,
2017 WL 3535296 (S.D.N.Y. Aug. 16, 2017) 14

Holtz v. Rockefeller & Co.,
258 F.3d 62 (2d Cir. 2001) 6

Humphries v. City Univ. of New York,
2013 WL 6196561 (S.D.N.Y. Nov. 26, 2013) 8

Jenkins v. St. Luke's-Roosevelt Hosp. Ctr.,
2009 WL 3682458 (S.D.N.Y. Oct. 29, 2009) 7

Kolari v. N.Y.-Presbyterian Hosp.,
455 F.3d 118 (2d Cir. 2006) 14

Littlejohn v. City of New York,
795 F.3d 297 (2d Cir. 2015) 9

Malanga v. NYU Langone Med. Ctr.,
2015 WL 7019819 (S.D.N.Y. Nov. 12, 2015) 12

Mesias v. Cravath, Swaine & Moore LLP,
106 F. Supp. 3d 431 (S.D.N.Y. 2015) 11

Moynihan v. New York City Health & Hospitals Corp.,
120 A.D.3d 1029 (1st Dep't 2014) 14

Muhammad v. New York City Transit Auth.,
450 F.Supp.2d 198 (S.D.N.Y. 2006) 4

Nguedi v. Fed. Reserve Bank of N.Y.,
2017 WL 2557263 (S.D.N.Y. June 12, 2017) 6

Patane v. Clark,
508 F.3d 106 (2d Cir. 2007) 6, 9

Phillips v. Ralph Lauren Ctr. for Cancer Care & Prevention,
22 Misc. 3d 1128(A), (Sup. Ct. 2009) 13

Port Dock & Stone Corp. v. Oldcastle Ne., Inc.,
507 F.3d 117 (2d Cir. 2007) 5

Reddington v. Staten Is. Univ. Hosp.,
11 N.Y.3d 80 (2008) 12

Reynoso v. All Foods, Inc.,
908 F. Supp. 2d 330 (E.D.N.Y. 2012) 6

Roberti v. Schroder Invest. Mgmt. N.A., Inc.,
2006 WL 647718 (S.D.N.Y. March 14, 2006) 4

In re Scholastic Corp. Sec. Litig.,
252 F.3d 63 (2d Cir. 2001) 3

Sira v. Morton,
380 F.3d 57 (2d Cir. 2004) 4

Smith v. Reg'l Plan Ass'n, Inc.,
2011 WL 4801522 (S.D.N.Y. Oct. 7, 2011) 11

U.S. v. Space Hunters, Inc.,
429 F.3d 416 (2d Cir. 2005) 4

Yan v. Ziba Mode Inc.,
2016 WL 1276456 (S.D.N.Y. Mar. 29, 2016) 10

Statutes

28 U.S.C. § 1367(c) 14

Title VII of the Civil Rights Act of 1964 Title VII .... *passim*

New York Labor Law Section § 741 .... *passim*

New York State Human Rights Law 1, 6, 14

Rules

Federal Rule of Evidence 802 10

Federal Rule of Civil Procedure 8(a)(2) 5

Federal Rules of Civil Procedure Rule 12(b)(6) 1, 3, 5

PRELIMINARY STATEMENT

This Memorandum of Law is submitted by Putney, Twombly, Hall and Hirson LLP, on behalf of Defendant, South Nassau Communities Hospital (the "Hospital"), in support of its motion pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss Plaintiff Leroy Jones's ("Plaintiff") Complaint in its entirety. Plaintiff's Complaint purports to allege the following claims: (1) unlawful termination on the basis of Plaintiff's race and gender in violation of Title VII of the Civil Rights Act of 1964 ("Title VII") and the New York State Human Rights Law ("NYSHRL"); (2) hostile work environment based on race and gender in violation of Title VII and the NYSHRL; and (3) retaliation against Plaintiff in violation of Section 741 of the New York State Labor Law ("NYLL Section 741"). As demonstrated below, Plaintiff's Complaint must be dismissed in its entirety.

Plaintiff's claims rest on the following premise: (i) Plaintiff is African American, a male, and he engaged in certain alleged protected activities; (ii) he was harassed and his employment was terminated; (iii) therefore, he was harassed and his employment was terminated because he is African American, a male, and/or because he engaged in protected activities. This is a false syllogism that has no basis in law and does not support an inference of discrimination or retaliation.

The Complaint is fatally deficient in several respects. Plaintiff's Complaint is devoid of any cognizable claim of discrimination. Plaintiff cannot allege facts sufficient to show that he was treated differently because of his protected classes or that the Hospital acted with discriminatory intent. Plaintiff's hostile work environment claims are similarly deficient since Plaintiff has not alleged facts sufficient to demonstrate that any alleged harassment that occurred during his two week employment with the Hospital was either severe or pervasive or because of

Plaintiff's race and/or gender. Plaintiff also cannot state cognizable claims of retaliation since Plaintiff has failed to allege sufficient facts to plausibly suggest a causal connection between any alleged protected activity and any adverse employment action.

Plaintiff's claim under NYLL Section 741 is also fatally deficient as a matter of law as he does not allege that he is an employee entitled to its protections. Accordingly, Plaintiff cannot sustain any of the causes of action alleged in the Complaint and the Complaint should be dismissed in its entirety as a matter of law.

RELEVANT FACTS

On July 11, 2016, Plaintiff began work at the Hospital as a full time Nurse Aide ("NA"). (Donnelly Decl. Ex. A, Complaint ¶ 12). Plaintiff was assigned to Hospital's Nursing Float Department as a Float NA. (Donnelly Decl. Ex. B). In this role, Plaintiff was not assigned to any particular unit, but would float to different units as needed. During Plaintiff's new hire orientation, Plaintiff was assigned to work with Preceptor Lucie St. Eloi, an African American woman. (Donnelly Decl. Ex. A, Complaint ¶ 14). Plaintiff alleges that Ms. St. Eloi criticized Plaintiff and swore at him for "doing too much work." (Id. at ¶ 15). On July 20, 2016, Plaintiff alleges that he complained to his supervisor, Allison Gelfand, about Ms. St. Eloi's conduct. (Id. at ¶ 20).

Later that day, Plaintiff was called into a meeting with Ms. Gelfand and Robert Davis, the nurse manager on the floor to which Plaintiff was assigned. (Id. at ¶ 21). Plaintiff had not been previously assigned to Mr. Davis's floor. Plaintiff asserts that at the meeting Mr. Davis questioned him about Plaintiff's abusive conduct towards patients, refusal to perform essential functions of his role, such as taking vital signs, and standing in the hallway and refusing to perform his job responsibilities. (Id. at ¶ 22). During this meeting, Mr. Davis further advised Plaintiff that he did not appreciate Plaintiff's conduct during the meeting. (Id. at ¶ 25). Plaintiff alleges that in response to his behavior that Mr. Davis told Plaintiff that he was "scared" by Plaintiff's behavior at the meeting to such an extent that Mr. Davis said to Plaintiff, "Please don't hurt me." (Id. at ¶ 26). As a result of the allegations that Plaintiff was acting abusively towards patients and refusing to do his required work, the Hospital suspended Plaintiff's employment pending further investigation. (Id. at ¶ 32).

After the Hospital's investigation into Plaintiff's conduct, the Hospital made the decision to terminate Plaintiff's employment in his probationary period. (Donnelly Decl. Exs. B-C). On July 27, 2016, Plaintiff met with Dawn Keiley, the Hospital's Director of Nursing. (Donnelly Decl. Ex. A, Complaint ¶ 34). Ms. Keiley informed Plaintiff that his employment was being terminated effective that day for his unprofessional and insubordinate conduct. (Id.). Plaintiff alleges that on August 2, 2016, after Plaintiff's employment was terminated, Mr. Davis referred to Plaintiff in a racially derogatory manner to an unidentified Hospital employee. (Id. at ¶ 37).

ARGUMENT

POINT I

APPLICABLE PLEADING STANDARDS FOR A MOTION TO DISMISS

A party may move to dismiss a complaint for "failure to state a claim upon which relief may be granted." Fed. R. Civ. P. 12(b)(6). Under Rule 12(b)(6), a motion to dismiss is properly granted when "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." In re Scholastic Corp. Sec. Litig., 252 F.3d 63, 69 (2d Cir. 2001) (quoting Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)). In ruling on a Rule 12(b)(6) motion, a court must "accept all of plaintiff's factual allegations in the complaint as true and draw inferences from those allegations in the light most favorable to the plaintiff." U.S. v. Space Hunters, Inc., 429 F.3d 416, 424 (2d Cir. 2005).

The court may also consider any documents: (1) attached to the complaint; (2) incorporated by reference in the complaint; or (3) that are "integral" to a plaintiff's claims, even if the documents are not explicitly incorporated by reference. De Jesus v. Sears, Roebuck & Co., Inc., 87 F.3d 65, 69 (2d Cir. 1996); see also Davis v. Columbia Univ., 2010 WL 2143665, at *2 (S.D.N.Y. May 26, 2010); Betancourt v. City of New York HRA/DSS, 2007 WL 2948345, at *2 (S.D.N.Y. Oct. 9, 2007) (citing Sira v. Morton, 380 F.3d 57, 67 (2d Cir. 2004)); Hanig v. Yorktown Cent. Sch. Dist., 384 F. Supp. 2d 710, 721 (S.D.N.Y. 2005). In deciding a motion to dismiss in employment discrimination cases, a court may also consider complaints and charges of discrimination filed with the SDHR and/or EEOC and any resulting administrative determinations. Daniel v. Long Island Hous. P'ship, Inc., 2009 WL 702209, at *5 (E.D.N.Y. Mar. 13, 2009); Muhammad v. New York City Transit Auth., 450 F.Supp.2d 198, 204-05 (S.D.N.Y. 2006) (taking judicial notice of an EEOC charge and agency determination); Roberti v. Schroder Invest. Mgmt. N.A., Inc., 2006 WL 647718, at *3 (S.D.N.Y. March 14, 2006) (EEOC filings may be properly judicially noticed on a motion to dismiss). Based upon the allegations asserted in the Complaint and the documents incorporated therein, Plaintiff has failed to state a claim upon which relief may granted and the Complaint must be dismissed in its entirety.

POINT II

PLAINTIFF HAS FAILED TO SATISFY THE APPLICABLE PLEADING STANDARDS

The Complaint fails to allege sufficient facts to state claims of unlawful discrimination and retaliation. Indeed, the Complaint does not satisfy the pleading standards established in Bell

Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), and Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009). Accordingly, the Complaint must be dismissed in its entirety.

A. ***Twombly* and *Iqbal* Pleading Standards**

Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." Twombly, 550 U.S. at 545-55 (internal quotations omitted). To survive a Rule 12(b)(6) motion, a complaint must set forth sufficient factual allegations that are "enough to raise a right to relief above the speculative level." Id. at 555. "A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do." Iqbal, 129 S. Ct. at 1949. Specifically, a complaint either must contain sufficient factual matter to state a claim to relief that is plausible on its face or it must be dismissed. Id. at 1949.

Where the facts alleged are "merely consistent with" defendant's liability, the complaint "stops short of the line between possibility and plausibility of 'entitlement to relief.'" Iqbal, 129 S. Ct. at 1949 (citing Twombly, 550 U.S. at 557). If the "well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not shown – that the pleader is entitled to relief." Id. at 1950 (internal quotations omitted). Plaintiff's Complaint is legally insufficient since it fails to allege the requisite elements of the claims asserted. Plaintiff's Complaint does not allege facts "consistent with" the conclusion that violations of the law occurred, nor does Plaintiff assert facts that "actively and plausibly suggest the conclusion." Port Dock & Stone Corp. v. Oldcastle Ne., Inc., 507 F.3d 117, 121 (2d Cir. 2007). Accordingly, the Complaint has not met the Twombly and Iqbal pleading standards and must be dismissed. See De Jesus v. Sears, Roebuck & Co., Inc., 87 F.3d 65, 70 (2d Cir. 1996) (holding that "conclusory allegations or legal conclusions masquerading as factual conclusions" were not sufficient to withstand a motion to dismiss).

POINT III

PLAINTIFF CANNOT STATE A CLAIM FOR HOSTILE WORK ENVIRONMENT

Plaintiff has failed to plead sufficient facts to support a claim for hostile work environment. In order to defeat a motion to dismiss, a plaintiff must plead facts that plausibly suggest he was subjected to conduct that: (1) creates an environment that a reasonable person would find hostile or abusive; (2) creates an environment that the plaintiff subjectively perceives as hostile or abusive; and (3) creates such an environment because of the plaintiff's protected class. Patane v. Clark, 508 F.3d 106, 113 (2d Cir. 2007); Reynoso v. All Foods, Inc., 908 F. Supp. 2d 330, 338-39 (E.D.N.Y. 2012). Hostile work environment claims under the NYSHRL are subject to the same standard as Title VII claims. Nguedi v. Fed. Reserve Bank of N.Y., 2017 WL 2557263, at *7 (S.D.N.Y. June 12, 2017). Plaintiff has failed to allege sufficient facts to plausibly suggest that the alleged harassment was intentional, based on his protected classes and objectively severe and pervasive to render the work environment hostile. Accordingly, Plaintiff cannot maintain claims of hostile work environment harassment.

To establish a hostile work environment, a plaintiff must show that "the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the [plaintiff's] employment." Cruz v. Coach Stores, Inc., 202 F.3d 560, 570 (2d Cir. 2000). "As a general rule, incidents must be more than episodic; they must be sufficiently continuous and concerted in order to be deemed pervasive." Holtz v. Rockefeller & Co., 258 F.3d 62, 75 (2d Cir. 2001). In other words, "[s]imple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment." Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998). Plaintiff's Complaint is devoid of any factual allegations which in any way suggests that the purported harassment was based on his gender or race and was severe or pervasive.

Plaintiff's Complaint identifies only a single comment alleged to have been made by Mr. Davis to an unidentified Hospital employee that referred to Plaintiff in a racially derogatory manner. (Donnelly Decl. Ex. A, Complaint ¶ 37). However, it is well settled that a single remark, even one including a racially derogatory term, is insufficient to establish the requisite frequency or severity for a hostile work environment claim. Boakye-Yiadom v. Laria, 2012 WL 5866186, at *10 (E.D.N.Y. Nov. 19, 2012). Further, Plaintiff admits that he did not hear the alleged comment nor learn of it until after the termination of his employment. Accordingly, the alleged derogatory comment is insufficient to demonstrate a hostile work environment. See Jenkins v. St. Luke's-Roosevelt Hosp. Ctr., 2009 WL 3682458, at *6, n.15 (S.D.N.Y. Oct. 29, 2009) (dismissing hostile work environment claims based on post-termination conduct); Fox v. Nat'l R.R. Passenger Corp., 2009 WL 425806, at *6 (N.D.N.Y. Feb. 19, 2009)(holding that comments that plaintiff did not witnesses and which occurred after he was no longer an active employee could not affect his working environment); see also Deras v. Metro. Transp. Auth., 2013 WL 1193000, at *8 (E.D.N.Y. Mar. 22, 2013) (holding that a plaintiff who relies upon alleged harassment that did not occur in plaintiff's immediate vicinity must establish that he shared the same environment as the person allegedly harassed, and that his own employment was adversely affected by the alleged harassment). As a matter of law, Plaintiff's Complainant fails to state a claim of hostile work environment based on race or gender.

Further, to the extent that Plaintiff attempts to use the comments allegedly made by Mr. Davis during their July 20, 2016 meeting as evidence of a hostile work environment, such a facially-neutral incident is also insufficient as a matter of law. During this meeting Plaintiff alleges that Mr. Davis told Plaintiff: (1) "I don't like your tone"; (2) "I don't like your attitude"; (3) that Plaintiff was "scaring him"; and (4) "You're so aggressive, please don't hurt me." (Donnelly Decl. Ex. A, Complaint ¶¶ 25-26). Plaintiff alleges that it "was clear to [Plaintiff] that [Mr. Davis's] comments about his 'attitude' and 'aggression' were based entirely on [Plaintiff's] race and gender." (Id. at ¶ 28). Plaintiff's subjective belief, however, that this single incident was based on his race and gender is insufficient to plausibly state a claim. Campbell v. Corr. Med. Care, Inc., 2014 WL 2608334, at *3 (W.D.N.Y. June 11, 2014) (dismissing plaintiff's hostile work environment claim when plaintiff alleged a single incident where she was reprimanded and her only allegation that it was based on her race was her "subjective and conclusory opinion" that she was being depicted as an "angry Black woman"); Humphries v. City Univ. of New York, 2013 WL 6196561, at *10 (S.D.N.Y. Nov. 26, 2013) (dismissing plaintiff's race based hostile work environment claim when she was referred to as "agitated, angry, belligerent, disruptive, hands on hip, hostile, threatening, and vituperative" when the only allegation that these adjectives related to plaintiff's race was her subjective interpretation of critical but facially-non-discriminatory terms). As Plaintiff does not allege that he was subjected to any severe or pervasive conduct based on his race or gender that affected his work environment, his hostile work environment claims must be dismissed.

POINT IV

PLAINTIFF CANNOT STATE A CLAIM FOR RACE OR GENDER DISCRIMINATION

Plaintiff's discrimination claims must be dismissed since the Complaint fails to allege sufficient facts to support an actionable claim of employment discrimination. In order to defeat a motion to dismiss, a plaintiff must allege facts that plausibly suggest that: (1) he was a member of a protected class, (2) he was qualified for his position, (3) he suffered an adverse employment action, and (4) his protected class or status was a motivating factor in the adverse employment action. Littlejohn v. City of New York, 795 F.3d 297, 311 (2d Cir. 2015). A complaint is properly dismissed when it fails to "plead any facts that would create an inference that any adverse action taken by any defendant was based upon a [protected characteristic]." Patane, 508 F.3d at 112. Plaintiff has not plead sufficient facts to survive a motion to dismiss.

Plaintiff does not allege any facts that would, if proven, establish: (i) that his race or gender were motivating factors in any adverse employment action; or (ii) that the Hospital acted with discriminatory intent. A plaintiff can establish discriminatory motivation or intent with indirect evidence such as "the employer's criticism of the plaintiff's performance in ethnically degrading terms; or its invidious comments about others in the employee's protected group; or the more favorable treatment of employees not in the protected group; or the sequence of events leading to the plaintiff's discharge." Littlejohn, 795 F.3d at 312. Plaintiff relies solely on conclusory allegations and vague hearsay to support his claims of discrimination on the basis of race and gender. Conclusory allegations and hearsay, however, are insufficient to plausibly suggest discriminatory motivation or intent.

Plaintiff does not allege a single fact demonstrating that his race or gender was a motivating factor behind the Hospital's action. Plaintiff's vague allegation based on hearsay is insufficient to plausibly suggest that the Hospital acted with discriminatory intent or was motivated by Plaintiff's race or gender. Plaintiff alleges that a former co-worker advised him that Mr. Davis had referred to him in a racially derogatory manner after the termination of Plaintiff's employment. (Donnelly Decl. Ex. A, Complaint ¶ 37). Plaintiff's allegation does not give rise to an inference of employment discrimination. First, Plaintiff has failed to include the particulars of the alleged use of the epithet, including, but not limited to, the identity of the individual who allegedly heard Mr. Davis utter the epithet. (Id.). Second, the allegation is not based on Plaintiff's personal knowledge, but rather on a second-hand account from one of Plaintiff's former co-workers. The alleged statement by the coworker is inadmissible hearsay and, thus, cannot be relied upon for the truth of the matter asserted. Fed. R. Evid. 802. Accordingly, even assuming the truth of the allegation that Plaintiff's coworker told him about the alleged use of the epithet, the coworker's statement cannot be used to plausibly suggest that the epithet was actually used under circumstances that would lead to an inference of discriminatory motivation or intent. See Davis v. Dep't of Veterans Affairs, 178 F. Appx 51, 52 (2d Cir. 2006). Since Plaintiff has not alleged and cannot allege sufficient facts to plausibly suggest that he was discriminated against because of his race or gender, his discrimination claims must be dismissed.

Further, the Complaint is devoid of any allegation regarding Mr. Davis's involvement in the decision to terminate Plaintiff's employment. It is well settled that isolated and stray remarks made by those with no involvement in the adverse action cannot be probative of discriminatory intent. Batiste v. City Univ. of New York, 2017 WL 2912525, at *8 (S.D.N.Y. July 7, 2017); Yan v. Ziba Mode Inc., 2016 WL 1276456, at *4 (S.D.N.Y. Mar. 29, 2016)(finding that derogatory statements were stray remarks and insufficient to raise an inference of discriminatory motive where the plaintiff did not demonstrate how such comments affected or were related to the termination decision); Mesias v. Cravath, Swaine & Moore LLP, 106 F. Supp. 3d 431, 438 (S.D.N.Y. 2015) (dismissing discrimination claim when there was no allegation that the comments were related to the decision making process). Since Plaintiff's Complaint fails to allege that the Hospital's decision to terminate his employment was in any way based on his race or gender Plaintiff's discrimination claims must be dismissed.

POINT V

PLAINTIFF CANNOT STATE A CLAIM OF RETALIATION UNDER NYLL SECTION 741

Plaintiff's retaliation claim under NYLL Section 741 is also without merit and must be dismissed. The Complaint asserts that Plaintiff was terminated in retaliation for complaints related to improper quality of patient care. In order to defeat a motion to dismiss Plaintiff's Section 741 claim, Plaintiff must allege facts that plausibly suggest that: (1) he participated in protected activity, (2) he suffered an adverse employment action, and (3) there was a causal connection between his engaging in the protected activity and the adverse employment action. Gorzynski v. JetBlue Airways Corp., 596 F.3d 93, 110 (2d Cir. 2010); see also Smith v. Reg'l Plan Ass'n, Inc., 2011 WL 4801522, at *5 (S.D.N.Y. Oct. 7, 2011) (applying Title VII retaliation standards to Section 1981 retaliation claims); Dougherty v. Meml. Sloan-Kettering Cancer Ctr., 2002 WL 1610916 (S.D.N.Y. July 22, 2002) (NYLL Section 740 claims). Plaintiff has not pled any facts which plausibly suggest a causal connection between his alleged protected activity and any adverse employment action. Therefore, Plaintiff cannot sustain his retaliation claims. See Id.

NYLL Section 741 provides protection only to those employees who perform health care services and disclose or threaten to disclose a policy, or practice of the employer that the employee, in good faith, reasonably believes constitutes improper quality of patient care. NYLL

Section 741(a)(1), (2). The New York State Court of Appeals has stated that the definition of employee under this provision is "exactingly specific" and is only meant to safeguard employees who are qualified by virtue of training and/or experience to make knowledgeable judgments as to the quality of patient care, whose jobs require them to make these judgments, and have raised concerns regarding the quality of patient care based on those professional judgments. Reddington v. Staten Is. Univ. Hosp., 11 N.Y.3d 80, 90-93 (2008). The statute does not apply to "an individual who does not render medical treatment." Id. at 93. A plaintiff who does not meet the definition of an employee under the statute is not entitled to its protection. Malanga v. NYU Langone Med. Ctr., 2015 WL 7019819, at *4 (S.D.N.Y. Nov. 12, 2015). Plaintiff is not an employee under NYLL Section 741, nor was his sole complaint related to the quality of patient care. Accordingly, he is outside the statute's protections and his claims must be dismissed.

Prior to his employment with the Hospital, Plaintiff had never worked in a hospital environment before. (Donnelly Decl. Ex. D). As a result of Plaintiff's inexperience, Plaintiff cannot demonstrate that: (1) he is qualified by virtue of training and/or experience to make knowledgeable judgments as to the quality of patient care; (2) his job required him to make judgments relating to patient care based on his training or experience; or (3) that he raised any concerns regarding the quality of patient care based on his professional judgment. Plaintiff's Complaint simply recites that he was a "trained health care professional, was able to make knowledgeable judgments as to the quality of patient care, and was required by Defendant to make such judgments as part of his job." (Donnelly Decl. Ex. A, Complaint ¶ 64). This mere recitation of the elements of the claim is insufficient to meet the plausibility standard required to withstand a motion to dismiss. Malanga, 2015 WL 7019819, at *4 (dismissing claims under

NYLL Section 741 when plaintiff only made conclusory allegations that she was a covered employee).

Similarly, Plaintiff has not alleged that his job required him to "render medical treatment." In Phillips v. Ralph Lauren Ctr. for Cancer Care & Prevention, 22 Misc. 3d 1128(A), (Sup. Ct. 2009), the Court held that a surgical technologist with an associate degree and thirteen years of experience as an endoscopy technician was not an employee within the meaning of NYLL Section 741 because his job did not involve making professional judgment about the quality of patient care. Id. In Phillips, the plaintiff alleges that he was responsible for:

> [C]hecking the equipment to make sure it was in proper working order, attaching EKG leads and oxygen tubes to patients, taking vital signs, attending "time out" periods with the anesthesiologist, gastroenterologist and patient to ensure that everyone was in agreement on the correct procedure, turning the patient on his or her side so that the anesthesia could be administered by the anesthesiologist, using a snare to remove polyps as directed by the physician who was working the scope, and bringing the patient to recovery.

Id. The Court found that these duties were administrative and non-discretionary and therefore not considered medical. Id. Similar to the plaintiff in Phillips, Plaintiff's job as a Nurse Aide did not involve making professional judgment about the quality of patient care. Rather, Plaintiff was simply responsible for administrative and non-discretionary tasks such as taking patient's vital signs and entering information in patient's electronic medical records. (Donnelly Decl. Ex. A, Complaint ¶¶ 20, 22). These types of duties are well below what is required to demonstrate involvement in making professional judgments about the quality of patient care necessary to be an employee covered by NYLL Section 741.

Further, the only issue Plaintiff alleges that he disclosed was that "Ms. St. Eloi attempted to use Mr. Jones's electronic medical records access to input incorrect information into a patient's chart". (Id. at ¶ 20). This allegation concerns an administrative matter and is therefore not eligible for protection under NYLL Section 741, regardless of whether Plaintiff is an employee under the statute. See Moynihan v. New York City Health & Hospitals Corp., 120 A.D.3d 1029, 1032-34 (1st Dep't 2014) (dismissing plaintiff's claim under NYLL Section 741 because her complaints regarding failing to properly complete paperwork were administrative in nature and not related to the quality of patient care). Plaintiff simply cannot state a claim under NYLL Section 741 and such claim must be dismissed.

POINT VI

THE COURT SHOULD DECLINE TO EXERCISE SUPPLEMENTAL JURISDICTION OVER ANY REMAINING STATE LAW CLAIMS

A district court may decline to exercise supplemental jurisdiction over state-law claims if "the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c). When all federal claims are eliminated before trial, the balance of factors to be considered -- including judicial economy, convenience, fairness, and comity -- typically points towards declining to exercise supplemental jurisdiction over any remaining state-law claims. Kolari v. N.Y.-Presbyterian Hosp., 455 F.3d 118, 122-24 (2d Cir. 2006). If the Court grants the Hospital's motion to dismiss Plaintiff's Title VII claims, the Court should decline to exercise supplemental jurisdiction over Plaintiff's NYSHRL and NYLL Section 741 claims because no federal claims will remain. Holmes v. Astor Servs. for Children & Families, 2017 WL 3535296, at *8 (S.D.N.Y. Aug. 16, 2017) (declining to exercise supplemental jurisdiction when only a NYLL Section 741 claim remained); Hanley v. Nassau Health Care Corp., 2013 WL 3364375, at *9 (E.D.N.Y. July 3, 2013) (declining to exercise supplemental jurisdiction when only a NYLL Section 741 claim remained).

CONCLUSION

For the reasons set forth herein, the Hospital respectfully requests that its motion to dismiss be granted in all respects, with prejudice, and that the Complaint be dismissed in its entirety, and that the Hospital be granted costs, fees, and disbursements, together with such other and further relief as the Court deems just and proper.

Dated: New York, New York
October 2, 2017

Respectfully submitted,

PUTNEY, TWOMBLY, HALL & HIRSON LLP

By: /s/ MED
Mary Ellen Donnelly
Steven J. Seidenfeld
521 Fifth Avenue
New York, New York 10175
(212) 682-0020

Attorneys for Defendant